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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 93

HENRY T. MCKINNEY,

Petitioner,

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

WAYNE R. HOWELL,
M. E. CLINTON,
DAN M. WELCH,
Barrett Building,
Denison, Texas,
Attorneys for Respondent.

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BRIEF FOR THE RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

QUESTION PRESENTED

Petitioner has, we believe, inaccurately stated the question presented here to be:

> "Whether, by virtue of Section 9 of the Universal Military Training and Service Act of 1951, petitioner, who had been promoted to an advanced position upon his return from military service, was entitled to senior-

ity in the new position from the date he would have obtained it had he remained in the continuous employment of the respondent."

In so stating the question petitioner assumes the ultimate question at issue, or begs the real question. We believe the question presented is in two parts, or that two questions are presented, and that fairly stated they are:

(a) Whether petitioner, an employee in Group 2 classification when he entered military service, has an absolute and unqualified right by virtue of Section 9 of the Universal Military Training and Service Act of 1951 and under the collective agreement, upon his return from military service, to be assigned to a position in Group 1 classification;

and

(b) Whether an employer, because of mistake of law, who gives an employee returning from military service greater benefits as to job preference than is contemplated by Section 9 of the Universal Military Training and Service Act of 1951 and by the collective agreement, is thereby foreclosed from adopting a subsequent authoritative interpretation of the Act and the agreement.

STATEMENT

This action was instituted against the Missouri-Kansas-Texas Railroad Company by Henry T. McKinney, an honorably discharged veteran, to enforce what he believes to be his reemployment rights under *Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U. S. C. App. 459, pp. 4-5* (R. 2-10). On its motion, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, was granted leave to intervene (R. 12-14). The United States District

Court for the Eastern District of Oklahoma dismissed the action without opinion, on the ground the complaint failed to state a claim upon which relief could be granted (R. 15-16). The United States Court of Appeals for the Tenth Circuit affirmed on appeal, *McKinney v. Missouri-Kansas-Texas R. Co., 240 F. 2d 8* (R. 17-22). The allegations of the complaint may be summarized as follows:

Railroad Company, respondent, has a collective bargaining agreement with Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, which has been in effect since August 1, 1925, and that organization represents all classes of clerical, office, station and storehouse employees, including petitioner.

Employees are divided into Groups 1, 2 and 3, with seniority rights restricted to the respective Group in which employed [Rule 1(3)(C), R. 6].

On September 25, 1950, petitioner was regularly employed in the capacity of Relief Clerk-Chief Caller, a position within Group 2 classification of the agreement [Rule 1(2), R. 6].

Petitioner entered military service September 26, 1950, and was discharged therefrom September 25, 1952.

While petitioner was in military service, the following Group 1 jobs were bulletined and the positions were filled by non-employees as follows:

Date of Bulletin	*Position*	*Person Employed*	*Date pay started and assigned seniority*
9- 8-1952	Bill Clerk	R. F. Fabian	9-15-1952
9-10-1952	Assistant Cashier	C. B. McCuan	9-22-1952

Petitioner was separated from military service September 25, 1952, on October 1, 1952 requested re-employment, and on October 7, 1952 was permitted to take the position of Assistant Cashier, a Group 1 position, started work on such position and pay started and he was assigned seniority in Group 1 as of October 7, 1952. The complaint alleges that petitioner "duly protested" that his seniority date was not correctly fixed and should have been fixed as of September 8, 1952 or September 10, 1952, the dates the positions in Group 1 were bulletined, rather than September 15, 1952 or September 22, 1952, the dates those employed started work on the Group 1 jobs and the dates their pay started. (Rule 4, R. 6).

On September 4, 1953, the position of Assistant Cashier was abolished, and on September 5, 1953, petitioner was assigned the position of Relief Clerk-Chief Caller, which position petitioner held when he entered military service, and which position he has since held. The complaint alleges that on September 2, 1953, petitioner "duly requested" he be permitted to exercise superior seniority to R. F. Fabian and displace Fabian as Bill Clerk, but was refused on the ground Fabian had a superior seniority rating.

Petitioner seeks relief on two grounds: That his seniority be fixed as of September 8, 1952, or September 10, 1952, the dates the Group 1 jobs were bulletined, which would give him a seniority rating superior to R. F. Fabian who was assigned seniority as of September 15, 1952, when he first performed services as Bill Clerk and on which date his

pay started. Petitioner seeks the further relief that he be permitted to recover as damages the difference in wages between the Group 1 position of Bill Clerk and the Group 2 position of Relief Clerk-Chief Caller since September 5, 1953.

SUMMARY OF ARGUMENT

Section 9 of the Universal Military Training and Service Act of 1951, requires that an employee returning from military service be restored to his employment without loss of seniority, and with such status in his employment as he would have enjoyed if he had remained continuously in his employment. The applicable provisions of the collective agreement fix the rights of all employees including those returning from military service, and the Act of Congress may be invoked to protect employment rights thus determined, but not to enlarge such rights or grant super seniority rights.

Petitioner, at the time he entered military service, was a Group 2 employee of respondent Railroad Company, under a collective agreement which restricted seniority to the respective Group in which employed [Rule 1(3)(C), R. 6], except Group 2 employees have a preference over non-employees in filling vacancies in Group 1 [Rule 1(3)(A), R. 6], based on fitness and ability, with seniority in Group 2 not a factor. Thus, the decision as to whether a Group 2 employee will be assigned to a Group 1 position is the exclusive prerogative of the employer.

While petitioner was absent in military service, two Group 1 positions became vacant, were bulletined by the employer, and were filled by non-employees. Provisions of the collective agreement would permit petitioner to apply for either vacant position had he not been absent in military service, but having no seniority in Group 1 which might be exercised, petitioner was not entitled as a matter of contractual right to be placed in either Group 1 position.

Upon return from military service, petitioner was assigned a Group 1 position under a mistake of law. Such improper assignment did not prohibit the employer from subsequently adopting a correct interpretation of the collective agreement. When the Group 1 position was abolished, petitioner was properly assigned to the Group 2 position he held when entering military service, with the same Group 2 seniority he held when entering military service, in full compliance with the "escalator principle" of the Act.

The complaint filed by petitioner alleges, in effect, that under applicable provisions of the collective agreement he was entitled, absolutely and without question, to be advanced to Group 1 classification on his return from military service. He now argues that he could establish at a trial on the merits his "fitness and ability" for a Group 1 position, although that is held to be an employer decision; and that he may or may not have been, or probably would have been, advanced to a Group 1 status, or that custom decreed such advancement, although the authorities universally hold the Act may be invoked to protect definitely ascertainable employment rights, as distinguished from probabilities. These allegations in petitioner's complaint, which are at variance

with clear provisions of the collective agreement attached to the complaint, may not be held to state a claim upon which relief could be granted, and dismissal of the complaint was proper.

ARGUMENT

We believe petitioner has reasoned on a false premise, and has reached an erroneous conclusion. His statement of the question presented clearly shows that he continues to assume the ultimate question at issue. We believe the crucial question is whether petitioner, a Group 2 employee, would have been entitled, absolutely and without question or qualification, to have obtained a job in the Group 1 classification had his employment with the Railroad Company not been interrupted by military service.

In the belief it may be helpful, we state again the question as tendered by petitioner, pointing out in footnotes the obvious error in petitioner's reasoning, as follows:

> Whether, under Section 9 of the Universal Military Training and Service Act of 1951, petitioner, *who had been promoted by respondent to an advanced position upon his return from military service*[1] was entitled to seniority in the new position from the date he would have had the *opportunity to qualify*[2] for the position had he remained in the continuous employment of the respondent.

[1] Petitioner assumes that he had a right under the collective agreement to be assigned to the advanced position, and was rightfully advanced, and ignores the crucial question of his *right* to be assigned. Both the District Court and the Circuit Court of Appeals took the view petitioner was assigned to the advanced position under a mistake of law, and held against petitioner on the crucial question of his right to be so assigned.

[2] Petitioner refers to the opportunity rather than a contractual right. The collective agreement provides no right or opportunity to qualify, such as apprenticeship or examination, leaving determination of that question to employer discretion.

We believe our statement of the question, or questions, fairly presents the issue, and we submit argument on the two questions, or two parts of the question.

(a) Whether petitioner, an employee in Group 2 classification when he entered military service, has an absolute and unqualified right by virtue of Section 9 of the Universal Military Training and Service Act of 1951 and under the collective agreement, upon his return from military service, to be assigned to a position in Group 1 classification.

We seem to be in agreement with petitioner that Section 9 of the Universal Military Training and Service Act protects the returning service man against loss of seniority rights, but to determine those rights we must turn to the provisions of the collective agreement. We submit the District Court correctly held the complaint did not state a claim upon which relief could be granted, and properly dismissed the action, and the Court of Appeals correctly affirmed.

Rule 1(3)(A) (R. 6), provides that promotion will be confined to the several groups in which employees — i.e. Group 1, Group 2 and Group 3 — except that Group 2 employees will be given preference over non-employees in the assignment to Group 1 jobs, on the basis of fitness and ability. It seems clear that any right to promotion, or to be assigned to a higher job classification, must be found in this rule. It is equally clear that no such right is here granted. A *preference* over non-employees is granted to Group 2 employees, *based on fitness and ability*, and nothing more. It is significant to note that *seniority* is not men-

tioned. It is our position that questions of fitness and ability are within the exclusive prerogative of the employer.

The case of *Bond v. Tennessee Coal, Iron & R. Co. (1947 D. C. Ala.), 73 F. Supp. 333*, is closely in point. There, an assistant payroll clerk entered military service, and on being discharged sought reemployment as payroll clerk, which would be a promotion. The collective agreement there provided for promotion on the basis of "ability, physical fitness, and seniority," but the relief sought was denied. The Court concluded that Bond had no fixed or absolute right to promotion under the rule in the collective agreement, that the right of promotion did not depend *solely* on seniority, and while it may have been the custom to promote the assistant payroll clerk with greatest seniority there was no right of promotion which could be enforced by the Act. There, seniority was a factor, but not the controlling factor since there were other factors within employer discretion, and military service had nothing to do with Bond's failure to be promoted. Had he remained continuously in defendant's employment he would have had no contractual right to an advanced position, and therefore had no such right upon his return from military service. If Bond, with senior seniority under a collective agreement making seniority a factor, was not entitled to an advanced position, how could it be said that petitioner, working under a collective agreement where seniority is not a factor, could be entitled to any of the relief he seeks here?

In the case *Meehan v. National Supply Co. (1947, C. A. 10), 160 F. 2d 346*, the Court affirmed judgment denying

relief sought under alleged reemployment rights. In holding Meehan was not entitled to be reemployed in a position created while he was in military service, or in other words denying the right to an advanced position, the Court stated the rule in these words:

> "The Act is to be construed liberally in order to effectuate the Congressional purpose, which was to safeguard the rights of those who entered the military service of their country and preserve to them the full benefits of the position which they occupied at the time for the period of time fixed in the Act. But this does not justify a strained construction of facts in order to give a returning veteran a higher position than the one he occupied at the time he entered the service, or a new position created after he was in the service."

The so-called "escalator principle" is not an enlargement of this rule, for to preserve the full benefits of the position the employee occupied at the time of entering military service, it would be necessary to preserve all rights that flow from that position, or that flow from seniority in that position.

The case of *Raulins v. Memphis Union Station Co. (C. A. 6), 168 F. 2d 466*, involves essentially the same "right to an advanced position" question as is presented here. There, the employees in the craft were divided into four groups, with seniority rights restricted to the particular group in which employed. Raulins entered military service while employed in one group, and on return sought promotion or assignment to a higher classified group on the theory he would have been promoted had his military service not broken his continuous employment. There, the collective

agreement provided the employee with greatest seniority in his group or craft would have *preference* in filling vacancies in higher groups or crafts, with ability also a factor. The Court held that Raulins, at the time he entered the military service, had no fixed right to promotion under any custom or contract, and that while the oldest employee in point of service was usually promoted, other factors required consideration, and while the Act guaranteed him seniority within his group, it did not guarantee him promotion to vacancies occurring in a higher group.

Additional authorities concerning the "right of promotion or assignment to higher classification" question are collected in the annotation appearing at *29 A. L. R. 2d 1316-1319*. The analysis of a large number of those cases would serve no useful purpose here, and we deem it sufficient to say that but one line of reasoning runs through these cases, the Act was not intended to do anything beyond preserving rights created under the collective agreement. If the agreement provides a right to advancement, such right is preserved. If the agreement provides something less than a *right*, such as the *preference over non-employees* to be found in the *Bond* and *Raulins* cases, supra, as well as here, the Act may not be relied upon to obtain the advanced position. The opinion of the Circuit Court in this case (R. 17, 21) refers to this *preference* as being a *qualified right*, and points out that "Had this vacancy ocurred while McKinney was in the employ of the company, he would not have had the *absolute* right to demand either of these positions over the non-employee applicants." Petitioner com-

plains this "absolute and unqualified right" test applied by the Circuit Court in some manner does violence to the "escalator principle," but it can readily be seen the application of such test merely limits the employee to what actually are rights under the collective agreement.

Petitioner does not contend that he suffered a "loss of seniority" by reason of his military service, but on the other hand it is admitted his present seniority date in Group 2 is the same as when he entered the military service. We submit that amounts to an admission that petitioner has received full benefits of the "escalator principle." Therefore, the cases *Oakley v. Louisville & N. R. Co., 338 U. S. 378,* and *Trailmobile Co. v. Whirls, 331 U. S. 40,* have no application, since they both deal with actual loss of seniority.

The case *Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275,* is frequently cited as a leading case. There Fishgold sought protection under the Act to give him greater seniority rights because of military service, and in rejecting his claim the Court stated *(328 U. S. 286):*

> "* * * We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran agains loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority means no more."

And in the same opinion, it was held *(328 U. S. 284-285):*

> "Thus (the veteran) does not step back on the seniority escalator at the point he stepped off. He steps back

> on at the precise point he would have occupied had he kept his position continuously during the war."

This rule was restated in *Oakley v. Louisville & N. R. Co.*, supra, when the Court stated *(338 U. S. 278, 283)*:

> "* * * (A)n honorably discharged veteran, covered by the statute, (is) entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment."

Petitioner contends the more recent case *Diehl v. Lehigh Valley R. Co., 348 U. S. 960, reversing 211 F. 2d 95*, is dispositive of this case. We believe an analysis of the fact situation in that case, in the light of differences in the pertinent provisions called rules of the collective agreement, clearly demonstrates the error of petitioner's reasoning. Petitioner details most of the essential facts involved in the *Diehl* case at pp. 16-19 of the brief, but simple and controlling fact distinctions must be drawn. Diehl, an employee in the classification of car man helper, was on February 19, 1943, designated temporary car man mechanic, a higher classification, which higher classified position he held some 55 days, or until he entered military service on April 15, 1943. In 1945, being honorably discharged, Diehl resumed employment as temporary car man mechanic which was the position held when he entered military service. On March 1, 1949, a collective agreement was entered into providing a temporary car man mechanic, after 1160 days'

service, would be entitled, absolutely and without considering other factors within employer discretion, to the permanent classification of car man mechanic. Non-veteran temporary car man mechanics completed 1160 days' service prior to the date Diehl was able to do so, because his service was interrupted by military service. Diehl became a temporary car man mechanic on February 19, 1943, and his seniority date in such classification was February 19, 1943. The collective agreement provided that after 1160 days' service Diehl would be entitled to be classified a car man mechanic, and had he remained in continuous employment there could be no question about his right to the higher classification. The result of the *Diehl* case is simply to apply the "escalator principle," and a contrary conclusion would discriminate against the veteran, which is condemned by the *Fishgold*, *Oakley* and all other reported cases.

The distinctions are clear. Diehl had performed services in the higher classification, and thereby had acquired a seniority date in the higher classification prior to entering military service, but in this case the petitioner had not performed services in Group 1 before his military service. Under the collective agreement Diehl was entitled to promotion after 1160 days' service, and his right was based solely on length of service, but the collective agreement here does not provide for absolute rights to be advanced to the Group 1 classification, and seniority is not even a factor. We submit the *Diehl* case is not in point.

The case *Morris v. Chesapeake & O. Ry. Co., 171 F. 2d 579 (C. A. 7)*, is likewise not in point, and the Circuit

Court distinguished between this case and *Raulins v. Memphis Union Station Co.*, supra, for the reason the factual situations in the two cases were different. In the last paragraph of the opinion in the *Raulins* case the Circuit Court pointed out that in the *Morris* case "Both the terms of the union agreement and the custom decreed that dispatchers be taken after qualifications *according to their seniority* from the telegraphers' roster." Morris, as the senior on the telegrapher's roster, was entitled by that fact to be advanced to dispatcher. In the instant case, the collective agreement [Rule 1(3)(A), R. 6] does not provide for promotion, automatic or otherwise; seniority is not mentioned in the rule; and petitioner is not allegedy senior on the Group 2 roster. The *Morris* case simply follows the "escalator principle" to prevent loss of rights based on seniority alone.

The case *Conner v. Pennsylvania R. Co., 177 F. 2d 854 (C. A. D. C.)*, is another case dealing with "rights" under the collective agreement, and does not deal with something less, such as a "preference" without fixed or absolute rights to be advanced. There the collective agreement gave freight trainmen the absolute right, on the basis of seniority alone, to transfer if they desired passenger train service. The opinion in the *Conner* case *(177 F. 2d 858)* distinguishes the *Raulins* case as dealing with an employee having an absolute right to promotion.

The case *Bostain v. Seaboard Air Line R. Co., 211 F. 2d 867 (C. A. 4)*, deals with rights to be advanced to higher classified position on the basis of seniortiy alone, or time

spent in a lower classified position as an apprentice. To the same effect is *Lipscomb v. Tennessee Coal, Iron & R. Co., 189 F. 2d 708 (C. A. 5)*. In *Addison v. Tennessee Coal, Iron & R. Co., 204 F. 2d 340 (C. A. 5)*; it was held (page 342) "Where an employee has no fixed or absolute right to promotion, and where his right to promotion depends upon qualifications over and above mere length of service" upon return from service he is entitled to restoration to the job he left, with accumulated seniority, but "is not entitled to promotions received by his successor during his absence * * *." The *Addison* case fully supports the judgment in the instant case. The case *Special Service Co., Inc. v. Delaney, 172 F. 2d 16 (C. A. 5)*, is similar on the factual situation to the *Addison* case, and is authority for our position. The case *Altgens v. The Associated Press, 188 F. 2d 727 (C. A. 5)*, turned on a construction of provisions of the collective agreement relating to right of promotion based on seniority alone or actual experience in the particular craft. Since seniority alone did not control as to the right of Altgens to the promotion he sought, his claim was rejected. In the case *Gregory v. Louisville & Nashville R. Co., 191 F. 2d 856*, a memorandum decision affirming *92 F. Supp. 770*, it was held the collective agreement did not provide for promotion on the basis of seniority alone, and relief claimed was denied. In the case *Seattle Star v. Randolph, 168 F. 2d 274 (C. A. 9)*, the question was whether time in military service was included in determining the proper amount of severance pay, and in denying the claim of the employee the Circuit Court upheld a provision of the collec-

tive agreement providing that time spent on furlough or leave of absence was not to be included in calculating severance pay, but only time spent on the job was to be included. The result was to treat the veteran Randolph exactly like non-veterans, which is consistent with the basic purpose of the Act, to prevent discrimination against the veteran, but at the same time not to confer on the veteran what has been referred to as "super seniority" or rights beyond those which would automatically flow to the veteran if his service had not been interrupted by military service. Petitioner cites these cases in note 11 at page 20 of the brief, with the suggestion these decisions, all prior to and irreconcilable with the *Diehl* case, are of doubtful present value. We believe each of these cases either supports our position, or can easily be distinguished on the factual situation, and are in no wise modified or overruled by the *Diehl* or later cases.

The complaint alleges, in effect, the conclusion that had petitioner remained continuously employed he would have obtained Group 1 status on September 8 or 10, 1952, but the collective agreement is attached to and made a part of the complaint, and petitioner's conclusion must be tested in the light of applicable provisions of the agreement. Obviously the District Court did so, and held, in effect, the conclusion reached by the petitioner was not supported by the agreement, and in affirming the judgment the Circuit Court of Appeals expressly so held. Group 1 status had not been obtained prior to military service, so petitioner had no seniority in Group 1 when he returned from military service. It seems clear that Group 1 status could be acquired,

if at all, only under the provisions of Rule 1(3)(A) (R. 6); or Rule 15 (R. 7); or Rule 10 (R. 7). We believe an analysis of each of these rules will disclose the correctness of the opinion of the Circuit Court of Appeals in holding *(240 F. 2d 8, 11)*:

> "* * * Had this vacancy occurred while McKinney was in the employ of the company, he would not have had the absolute right to demand either of these positions over the non-employee applicants. * * *."

Rule 1(3)(A). (R. 6), cannot be construed to give McKinney a right to be assigned a Group 1 status, at any time, unless the employer desires to do so. Under this rule his *seniority* is restricted to the Group in which he was employed—i.e. Group 2—with a preference over non-employees, based on fitness and ability. Seniority is not a factor, and the employer may or may not see fit to assign a Group 2 employee to a Group 1 vacancy, or may assign the Group 2 employee with greatest or least seniority. We believe the authorities cited in this brief, construing similar provisions in other collective agreements, do not support petitioner's theory that Rule 1(3)(A) confers any contractual right to promotion or assignment to higher classification such as could be enforced by the Act.

Rule 15 (R. 7) does confer definite and ascertainable contractual rights in the form of two options, only one of which could have been exercised by petitioner. Under this rule it is admitted that one returning from military service may either (a) return to his former position, or (b) exercise *seniority rights* to any position bulletined during his

absence. McKinney asserts no violation of his rights under option (a). The positions bulletined were in Group 1, where McKinney then had no seniority which he could exercise under option (b). It is significant to note that one holding a mere *preference over non-employees* is not mentioned under option (b), but a returning employee exercising this option is limited to one having *seniority rights*. We believe Rule 15 does not confer on McKinney any rights to a Group 1 status that could be enforced by the Act.

The other rule relied upon by petitioner is Rule 10 (R. 7), which provides that vacancies will be bulletined in places accessible to all employees *affected* for 5 days in the seniority district where the vacancies occur. The *preference over non-employees* provision of Rule 1(3)(A) may make McKinney an *affected* employee such as would enable him to request assignment to the Group 1 vacancy, but there is nothing in Rule 10 which modifies or limits Rule 1(3)(A) in so far as employer discretion is concerned. The obvious purpose of Rule 10 is to provide a procedure to exercise rights, rather than to confer rights.

We respectfully submit that none of the rules relied upon by petitioner could be construed to confer the rights claimed, and that the record does not support the conclusions of the complaint.

At numerous places in his brief petitioner contends that he *might have been*, or *probably would have been*, assigned the Group 1 vacancy had he remained in continuous employment. We believe those matters are wholly immaterial,

for it clearly appears from all the reported cases that the Act was designed to protect rights rather than probabilities. If these claimed probabilities have any substance at all, their basis would have to be in custom rather than under contractual rights, and custom has been held insufficient to justify relief under the Act. *Raulins v. Memphis Union Station Co.*, supra, *Bond v. Tennessee Coal, Iron & R. Co.*, supra.

Petitioner contends the District Court should not have dismissed, but rather should have permitted a trial on the merits. If a trial be held petitioner would offer proof that he could meet the "fitness and ability" test of Rule 1(3)(A), but the authorities hold that decision is for determination by the employer. He might also offer evidence that custom decreed his advancement, but there again the reported cases hold that is not enough. Any evidence offered at a trial would be weighed in the light of controlling provisions of the collective agreement, and we submit the District Court could not have reached a different determination if petitioner offered proof on each point he mentioned in the brief.

> Whether an employer, because of mistake of law, who gives an employee returning from military service greater benefits as to job preference than is contemplated by Section 9 of the Universal Military Training and Service Act of 1951 and by the collective agreement, is thereby foreclosed from adopting a subquent authoritative interpretation of the Act and the agreement.

Petitioner makes much of the fact he was assigned a Group 1 position upon return from military service, and was permitted to displace McCuan, a person placed in that position fifteen days previously. By some process of reasoning, petitioner concludes he thereby "qualified" for, or was promoted to, the higher classified position bulletined during his absence. It is abundantly clear that McKinney had no right under the collective agreement to displace McCuan, and it is equally clear that action resulted from a mistake of law, a mistake as to the contractual rights of both McCuan and McKinney. The rights of McCuan are not involved here, but only those of McKinney. Having given McKinney a job preference to which he was not entitled, can it be said that Section 9 of the Act may be invoked to perpetuate the job status erroneously assigned by the employer? Could Congress have intended that result? We do not believe either question can be answered in the affirmative. We know of only one reported case on the precise point. In *Freeman v. General Motors Corp., 86 F. Supp. 527*, the District Court for the Eastern District of Michigan held that where an employee, because of mistake of law, gave veterans greater benefits as to job preference than those provided by the collective agreement and contemplated by the Act, the employer was not foreclosed from adopting a subsequent authoritative interpretation of the agreement and the Act. We submit the *Freeman* case is based on sound reasoning, and should be approved by this Court.

If, as contended by petitioner, his "fitness and ability" was determined on October 1, 1952, when he requested re-employment, or on October 2, 1952, when he was assigned the Group 1 position of "assistant cashier," or on October 7, 1952, when he first performed compensated services as assistant cashier (Rule 4; R. 6), it does not follow that his fitness and ability to perform any other Group 1 position was thereby determined. That would still remain a decision for management. He may or may not have been considered fit and able to handle the duties of "bill clerk" (the position then and now occupied by Fabian) or any one of a number of other positions in Group 1. The most that can be said, or established at a trial on the merits, is that if petitioner had remained continuously in respondent's employment he may or may not have been assigned to the Group 1 position of bill clerk he now seeks.

CONCLUSION

We submit that petitioner misconceives his rights under the collective agreement; that he would have had no fixed or absolute right to be assigned a Group 1 position had he remained in continuous employment, and his military service and honorable discharge therefrom cannot be held to enlarge those rights; and giving to petitioner upon his return from military service greater benefits as to job preference than he was lawfully entitled, does not prohibit respondent from adopting a subsequent authoritative interpretation of the collective agreement and the Act.

The opinion and judgment of the Circuit Court of Appeals is in full accord with decisions of this Court, and correctly construes the Act of Congress; fully protects the rights of petitioner under the "escalator principle"; and affords to petitioner every right to which he is entitled under the collective agreement.

WHEREFORE, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

WAYNE R. HOWELL,
M. E. CLINTON,
DAN M. WELCH,
Barrett Building,
Denison, Texas,
Attorneys for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have today served a copy of the foregoing brief upon each of the following persons, viz: J. Lee Rankin, Solicitor General, Washington 25, D. C., and Carroll J. Donohue, 506 Olive Street, St. Louis 1, Missouri, by mailing a copy to each of them by first-class mail, properly addressed to each of them, with postage prepaid.

Dated September 27th, 1957.

M. E. CLINTON
Of Counsel for Respondent,
Missouri-Kansas-Texas
Railroad Company